OTION FILED
NOV 23 1986

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No. 86-473

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE, CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 22, 1986

MOTION OF CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the Connecticut Business and Industry Association ("CBIA") moves the Court for leave to file its brief amicus curiae (bound with this motion) in support of the petition for certiorari.

CBIA is an organization of firms which operate in the State of Connecticut. CBIA presents the opinions of its members on environmental policy and other public issues to government agencies and legislators. It has sponsored meetings between member firms and government agencies to encourage compliance with the environmental laws by fostering cooperation between business and government.

However, under the rule adopted by the

court below and by the District Court for the District of Connecticut in Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Co., Inc., 623 F.Supp. 207 (1985), members of CBIA that have cooperated fully with the government and are complying with the Clean Water Act are still subject to multimillion dollar penalties for past violations in suits brought by private parties.

Members of CBIA frequently have been targets of citizen suits brought under the Clean Water Act. Of 47 citizen Notices of Intent filed in Connecticut, approximately 42 were filed against members of CBIA or their subsidiaries. Of 32 citizen suits known to have been filed in Connecticut, all but one were filed against past or present members of CBIA. These members have paid over a million dollars in settlements, much of which has been paid

as environmental contributions in lieu of civil penalties for past violations of the Act. Other suits are pending. Respondent Natural Resources Defense Council has been a plaintiff in all the citizen suits brought against members of CBIA.

CBIA has requested the consent of the parties to the filing of its amicus brief in support of the petition for certiorari. The Petitioner, Gwaltney of Smithfield, Ltd., has consented, as evidenced by the letter from its counsel, Hogan & Hartson, attached to the filing letter enclosed herewith. The Natural Resources Defense Council has declined to give its consent. The Chesapeake Bay Foundation, Inc., has failed to respond to CBIA's request for consent.

Amicus believes that it will present arguments in favor of granting certiorari which will not be presented by the parties to this action or by other amici. CBIA

offers a broader perspective gained from an ongoing study of citizen suits under the Clean Water Act, 33 U.S.C. Sec. 1365.

This study has shown that in the last four years there has been a sudden flood of such suits across the country. Over five hundred notices of intent to file such suits have been issued in at least 38 states and all ten of EPA's regions. The lower courts are divided and in need of guidance on whether to accept the recently advanced theory that defendants who are in full compliance with the Act are still liable for multimillion dollar civil penalties for past violations.

Research also shows that most of this sudden increase in litigation is the work of a small number of organizations. The threat of large civil penalties for indisputable past violations is frequently used to influence defendants to accept settlements which include payments to the

plaintiff, or to a related organization or project, together with attorneys' fees. This incentive to sue for private gain conflicts with the expressed intent of Congress. It also frustrates efforts to foster compliance with the law. Permittees, such as the members of CBIA, who have cooperated fully with official regulations may nonetheless face conflicting demands from freelance "regulators".

This broader perspective on the issues is peculiarly within CBIA's understanding, both from its direct experience with its members in Connecticut, and from its investigation into the nationwide scope of the current citizen suits practice. For the foregoing reasons, CBIA prays that

this Court grant its motion for leave to file the accompanying brief amicus curiae.

By its Attorneys,

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QUESTION PRESENTED

Whether the citizen suits provision of the Clean Water Act, 33 U.S.C. §1365, authorizes citizens to bring suit for civil penalties for past violations against defendants who are currently in full compliance with the Act?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in the State of Connecticut, having 6300 members who employ a total workforce of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

CBIA and its members have been directly involved in the issue that is before the Court. Of the 47 Citizen Notices of Intent filed in Connecticut since 1983, approximately 42 have named CBIA members as defendants.

The interest of CBIA is more fully set forth in its Motion for Leave to File Brief as Amicus Curiae, above.

INTRODUCTION AND STATEMENT OF THE CASE

The amicus, Connecticut Business and Industry Association, adopts and incorporates by reference the Statement of the Case of Gwaltney of Smithfield, Ltd., in its Petition for Certiorari.

The amicus also submits, however, that a broader perspective on the issues herein is both relevant and important to this Court's consideration of the Petition. This case presents a question of statutory interpretation which will not only determine the interests of the parties immediately before the Court, but will also provide guidance to the many lower courts which are confronting a rising flood of such litigation nationwide.

The citizen suits provision of the Clean Water Act, which was enacted in 1972, was used only infrequently during the first decade of its existence. During

the four years from 1978 through 1981, for example, an average of fewer than five such suits per year were filed.[1]

Since late in 1982, however, there has been a dramatic increase in citizen suits under the Clean Water Act. The increase appears to have been at least accompanied, if not in large part fueled, by the theory that such suits are available not merely for abatement actions for ongoing violations, but for civil penalty claims for past violations.

Beginning in late 1982, the United States Environmental Protection Agency has kept a log of all citizen notices of intent to sue, required by §505 of the Act, 33 U.S.C. §1365, filed with its headquarters in Washington. In the

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1. Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes (1984) (hereinafter "ELI Study") at III-10,27,29.

four-year period from September of 1982 to August, 1986, at least 558 citizen suit notices have been filed with EPA.[2]

The statute does not require notice to EPA upon the subsequent filing of litigation, and the percentage of citizen suit notices which have resulted in suit is difficult to ascertain. Investigation has thus far disclosed that at least 135 of the notices have been followed by the filing of a federal court Complaint, but the true figure is certainly higher. At least 298 of the 558 notices, or roughly 53 percent, have been filed by one of only six private organizations: the Natural

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2. This is a minimum figure, as the true numbers are likely in fact to be higher. Some notices are filed with EPA regional offices and do not appear in EPA's Washington files. Freedom of Information Act requests are pending with the remaining five EPA regions.

Resources Defense Council, the Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, and the Student Public Interest Research Group of New Jersey.

The amicus offers these facts principally in support of three propositions. First, the issue involved in this matter is one only recently raised by plaintiffs, and is of increasingly widespread importance to an increasing number of lower courts. The sheer number of cases brought, together with the vast potential for future cases not only under the Clean Water Act,[3] but also under the corresponding provisions of other federal

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3. As of January, 1984, roughly 65,000 permits had been issued under the Clean Water Act. Petition for Certiorari of Gwaltney of Smithfield, Ltd. (hereinafter "Petition") p. 23.

environmental statutes,[4] indicate the importance of the need for guidance to the lower courts on the availability of jurisdiction for such suits when past violations are claimed.

Second, the use of citizen suits for civil penalties for past violations, and the plaintiffs' common tactic of settlement, raise questions concerning the incentive to such litigation. Congress made clear its intent to enact a provision

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4. Provisions for citizen suits for civil penalties against any person "who is alleged to be in violation" of the law exist in the Resource Conservation and Recovery Act, (RCRA) 42 U.S.C. §6972 (1984) (penalties of up to $25,000 per day of violation); and in the Superfund Amendments and Reauthorization Act of 1986, Pub.L. 99-499,§206, adding new §310 to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq. (penalties of up to $25,000 per day of violation for a first offense and up to $75,000 per day for subsequent offenses).

the use of which would be motivated solely by concerns of public health and welfare. Currently, however, the threat of steep civil penalties under the Act is frequently used to influence defendants to accept settlement demands which include a financial contribution either directly to the plaintiff organization, or to a related organization or an environmental project, together with costs and attorneys fees. The incentive to sue, particularly for litigating environmental organizations, has become less one of concern for the public health and welfare, and more one of private gain for the organization.

And finally, the plaintiffs' interpretation of the statute is improper for reasons of public policy. The increasing use of citizen suits in instances where the responsible environmental agency has specifically

chosen to ensure compliance by means other than the exercise of its civil penalty authority interferes with efforts to bring permittees into full and prompt compliance. Granting to citizen groups an enforcement power in important respects equal to, rather than supplementary of, the Administrator's inevitably leads to inconsistencies of application and significant disagreement with the regulation and enforcement methods and priorities of the responsible agencies.

For all of the above reasons, the amicus submits that this Court's grant of the requested writ is both necessary and appropriate to clarify a question of law which is of increasing importance to the lower courts.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit Court of Appeals below directly conflicts with decisions of this Court and of the Fifth and Seventh Circuits, which have clearly stated that the citizen suits provision of the Clean Water Act provides jurisdiction only for current or ongoing violations.

The District Court lacked subject matter jurisdiction over this suit because the Clean Water Act was not being violated at the time suit was filed. The statutory language and the legislative history establish Congress's intent that citizen suits be available for the purpose of abatement of ongoing violations, and not for claims for civil penalties for past violations.

The lower courts are divided and need guidance on what is becoming a common variety of suit. The extent of citizen

suit litigation has increased substantially over the past several years.

Congress intended to enact a citizen suits provision which would be used purely for the purpose of protecting the public health and welfare. As the provision is currently being used, however, it provides a private incentive to suit which conflicts with the intent of Congress.

ARGUMENT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, AND WITH A DECISION OF THIS COURT, AND MIS-READS THE STATUTORY LANGUAGE.

A. The Ruling of the Fourth Circuit Below Squarely Conflicts With the Rule in the Fifth and Seventh Circuits, and With This Court's Opinion in Middlesex County.

The Clean Water Act provides for federal jurisdiction over citizen suits against a private party only if that party

"is alleged to be in violation" of an effluent standard or limitation. 33 U.S.C. §1365(a)(1). This jurisdictional requirement is clearly stated in the present tense, and does not grant jurisdiction over a party alleged to have violated a standard at some time in the past.

The Fifth Circuit Court of Appeals, with reference also to decisions of the Seventh Circuit and of this Court, has provided the clearest ruling on the issue, in Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 395 (1985):

> By its ordinary meaning, the language of §1365 requires an allegation of an ongoing violation . . . . Hamker asserts that "to be in violation of" means "to have violated"; however this interpretation obviously strains the grammar of the statute and diverges from its ordinary meaning. "[Section 1365] does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past. . . ." City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979), cert. den., 444 U.S.

1025 (1980) (cited with approval in Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, [18, n.28] (1981).

The Court below expressly disagreed with Hamker, finding that the language of the statute can be read "to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit." Petition for Writ of Certioriari (hereinafter "Petition") at 8a. Relying, as to the central issue, exclusively on district court precedents, the Fourth Circuit held that "citizen suits ..., seeking civil penalties for permit violations committed entirely in the past, are permitted under §505(a)." Id. at 17a.

A clearer statement more squarely in conflict with Hamker could not be devised. In Hamker the Fifth Circuit plainly held that "prospective relief is the only kind of relief authorized by the Act's citizen suit provision, and that civil penalties

are available 'only as prospective relief.'" Id. at 15a, citing Hamker, 756 F.2d at 398-99. The Court below conceded the direct conflict between its reading of the statute and that of Hamker. While suggesting that "it could be argued that Hamker is distinguishable on its facts," the Court declared that even if it is not distinguishable, "we decline to follow it to the extent that it holds that §505(a) of the Clean Water Act does not permit citizen suits seeking civil penalties for past violations." Petition at 15a.

The Court also acknowledged contrary language by the Seventh Circuit in City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), and by this Court in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). According to the Court below, any statements in

Middlesex County "limiting the scope of citizen suits to prospective relief were mere dicta," while the Seventh Circuit's comments in City of Evansville regarding the unavailability of civil penalties for past violations were "wholly unnecessary to its decision." Petition at 16a, and n. 14, citing City of Evansville, 604 F.2d at 1014; Illinois v. Outboard Marine Corp., 619 F.2d 623, 631 (7th Cir. 1980), vacated and remanded, 453 U.S. 917 (1981), on remand, 680 F.2d 473 (7th Cir. 1982); and Pawtuxet Cove Marina v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1390, 1393 (D.R.I. 1984).

The Fourth Circuit may not, however, so easily dismiss as inapposite statements of statutory interpretation which are central to the holdings of City of Evansville and of Middlesex County. Both cases presented claims for damages pursuant to an implied private right of

action under the Clean Water Act, and the analysis necessarily demanded an examination of the nature and adequacy of the remedies which the Act expressly does provide.

It was in this context that the Seventh Circuit and this Court made clear reference to the limited nature of the citizen's right of action explicitly contained in the statute, and did so in terms plainly inconsistent with the theory of the instant case. The citizen suits provision "allows suits under the Act by private citizens, but authorizes only prospective relief," 453 U.S. at 6 (emphasis supplied); and permits private citizens "to sue for injunctions to enforce" the statute. Id. at 14. The structure of the Act and its legislative history underscore "the limited nature of the citizen suits being authorized." Id. at 17, n. 27. And according to the

Seventh Circuit:

> [The citizen suits provision] authorizes a civil action against a party "alleged to be in violation" of effluent standards or limitations under the Act.... It does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages.

City of Evansville, 604 F.2d at 1014 (emphasis supplied).

The district courts are similarly divided. District Courts in Louisiana, Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F.2d 1013 (M.D. La. 1985), app. pending, No. 85-3763 (5th Cir.), Sierra Club v. Monochem, No. 84147B (M.D. La. 1985) app. pending, No. 85-3762 (5th Cir.); and Rhode Island, Pawtuxet Cove Marina, Inc., v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1390, 1393 (1984), 22 Env't Rep. Cas. (BNA) 1999 (1985), have ruled that there is no jurisdiction over such suits. Courts in New Jersey, e.g. Student Public Interest Research Group v.

Monsanto Co., 600 F.Supp. 1474 (1985); Massachusetts, Sierra Club and Natural Resources Defense Council v. Raytheon, 22 Env't Rep. Cas. (BNA) 1050 (1984); Connecticut, Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Co., Inc., 623 F.Supp. 207 (1985); New York, Sierra Club v. Hanna Furnace Corp., 636 F.Supp. 527 (W.D.N.Y. 1985), Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284 (N.D.N.Y., 1986); Pennsylvania, Fishel v. Westinghouse Electric Corp., 640 F.Supp. 442 (M.D.Pa. 1985), and Virginia, in the instant suit, have reached the opposite conclusion.

B. The Legislative History Establishes Congress's Intent to Limit Citizen Suits to Abatement of Current Violations.

Congress intended in the Clean Water Act to write a statute whose meaning would be clear on its face. "[W]e have tried in

this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." Remarks of Sen. Muskie during Senate debate, A Legislative History of the Water Pollution Control Amendments of 1972 ("Leg. Hist."), Vol 1 at 163-164 (1973).

Where the language of a statute is plain on its face, the courts are constrained to apply that language, and not to re-fashion the wording according to its own perception of how Congress must have meant the provision to be phrased. Consumer Products Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

Resort to the legislative history for interpretive guidance, however, further underscores that Congress intended to authorize citizen suits only to "abate" ongoing violations of the Act. See S.

Rep. 414, 92d Cong., 1st Sess. at 79-81, reprinted in 1972 U.S. Code Cong. & Ad. News, vol. 2 at 3745 ("USCCAN") and in 2 Leg Hist. at 1482, 1497. "Abate" means "to put an end to." Webster's New World Dictionary, p. 2 (1976). Other comments in the legislative history support this interpretation. The purpose of the citizen suits provision was described as permitting citizens to "seek compliance . . . with the Act," Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, 92d Congress, 1st Sess., Serial No. 92-H9 at 109; "to abate a violation," id. at 114; and to sue "for the purpose of abating pollution," Id. at 707 (comment of Sen. Eagleton). "[A] citizen can obtain an injunction but cannot obtain money damages for himself." 1 Leg. Hist. at 220-21 (comment of Sen.

Bayh).

Congress expressed concern that the citizen suits provision be restricted to abatement rather than be a source of funds for private persons and groups. 1 Leg. Hist. at 674. The Fifth Circuit pointed out in Hamker that permitting citizen suits for past violations would defeat this Congressional intent:

> If §1365 were interpreted as permitting citizen suits for civil penalties for past violations, all state damage claims which could be brought under pendent jurisdiction could be litigated in a federal forum, thus undermining congressional intent to limit the burden on the district courts. Since the Act provides for awards of attorney's fees and expenses, there would be a substantial incentive to bring suit under the Act rather than in state court.

756 F.2d at 396.

The citizen suits provision of the Clean Air Act of 1970, which provided for citizen suits for the first time, and which formed the model for the Water Act version, was the subject of extensive

debate over fears that it would clog an already congested federal court system. R. Schwartz & D. P. Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327 (1984) (herinafter Schwartz & Hackett) at 328. Concern was expressed over the possibility of frivolous, harassing or duplicative suits and conflicts between EPA policy and citizens' strategy. Id. at 328-29. In response Senator Hart argued that the inability of plaintiffs to collect damages would limit the number of suits filed. Id.

The addition in the Clean Water Act of a provision empowering the Courts to assess "any appropriate civil penalties" was not discussed in the legislative history, Schwartz & Hackett at 331, except to specify that any such penalties be paid into the federal Treasury. Congress considered and specifically rejected the

option of allowing citizens to collect part of the penalties. 1 Leg. Hist. at 220-21 (comment of Sen. Bayh). The Senate Committee Report on the Amendments stated, "It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant." Report of the Senate Public Works Comm. at 79, reprinted in 2 Leg. Hist. at 1497.

This Court has recognized, as has the Fifth Circuit in Hamker, that "one of the primary congressional purposes behind limiting citizen suits was to preclude the possibility that §1365 suits would place an undue burden on the federal courts." Hamker, 756 F.2d at 396.

> [T]he legislative history of the [Clean Air] Act contains explicit indications that private enforcement suits were intended to be limited to the injunctive relief expressly provided for. Senator Hart, for example, stated:
> "It has been argued, however, that conferring additional rights on the

> citizen may burden the courts unduly. I would argue that the citizen suit provision of §1358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill." 116 Cong. Rec. 33104 (1970).

Middlesex, 453 U.S. at 17, n. 27 (emphasis supplied). It was this measure, incorporated in the Clean Water Act, which Senator Muskie recognized as a "restrictive" citizen suits provision. Scwartz & Hackett, at 330. See also, Hamker, 756 F.2d at 396 (availability of citizen suit for civil penalties for past violations, because Act allows for attorneys' fee awards and expenses, would undermine congressional intent to limit actions to those brought solely to protect

health and welfare.)

The present use of the citizen suits provision for civil penalty claims for past violations directly conflicts with this expression of Congressional intent.

II. THE LOWER COURTS ARE FACED WITH AN INCREASING NUMBER OF SUCH CITIZEN SUITS, AND ARE IN NEED OF GUIDANCE FROM THIS COURT.

A. The Extent of Citizen Suit Litigation Has Increased Dramatically Over the Past Four Years.

This Court's jurisdiction is appropriate in this matter also to provide guidance to the increasing numbers of district courts which are required to confront the issue. Litigation under the citizen suits provision of the Clean Water Act has become, since late in 1982, increasingly common, and similar private rights of action exist under both RCRA and CERCLA as recently amended.

From its enactment in 1972 until late in 1982, the citizen suits provision of the Clean Water Act was rarely used. During the four years from 1978 through 1981, for example, an average of fewer than five per year were filed nationwide. ELI Study III-10, 27, 29.

Beginning in late 1982 with the filing of a group of 14 by one law office, the numbers of such suits have increased dramatically. Although EPA's records are apparently not complete, they do reveal that in the four years since that time at least 558 notices have been filed. See Chart, Appendix A, attached hereto. What percentage of these notices have subsequently been followed by litigation is not yet fully known, but it is known that at least 135 have resulted in federal court Complaints. If Connecticut is any guide the numbers are likely to be even higher. Of 47 notices of intent filed in

Connecticut from 1983 to date, 32 (68%) are known to have led to federal court litigation.[5]

The citizen suit notices have been well distributed geographically, with each of the ten EPA Regions and at least 38 states and the District of Columbia represented. The principal activity has been in Pennsylvania (90 notices), New York (73), Connecticut (47), New Jersey (36), Louisiana (34), Massachusetts (33), Texas (31), California (24), and Ohio (22).

The identity of the plaintiff groups responsible for the upsurge of notices is

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5. By another account, of the 108 citizen suit notices filed in 1983 alone, 62 led to federal court suits, which together requested approximately $100 million in penalties. Lewis, "Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional Under the Separation of Power Doctrine," 16 Envir. Law Rep. 10101, 10102 (1986).

not nearly so diverse. Most of the citizen suit notices known to have been filed since September of 1982 -- 298 of the 558 notices, or 53% -- have been filed by or on behalf of only six organizations: Natural Resources Defense Council, Sierra Club, Friends of the Earth, Atlantic States Legal Foundation, Connecticut Fund for the Environment, and New Jersey Public Interest Research Group. All six are either parties or amici in the instant case. They often join in filing notices and filing suit.[6]

There is, of course, nothing per se improper in the fact that so large a share

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6. The Natural Resources Defense Council has filed 106 notices; Sierra Club has filed 121; Friends of the Earth, 37; Atlantic States Legal Foundation, 56; Connecticut Fund for the Environment, 42; and New Jersey Public Interest Research Group, 38. These figures total more than 298 because of the frequent joint filings.

of this litigation and threatened litigation is carried on by so limited a cast of plaintiffs. But the extent of the plaintiffs' practice in this area, and the pattern which it follows, combine to lend weight to the argument that this use of the citizen suits provision, which appears to be fueled in large part by the theory that such suits are available for past violations, is a far cry from what Congress ever intended.[7]

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7. The time lag involved in the preparation and filing of the Discharge Monitoring Reports on which the notices are based, and the incompleteness of the information the amicus has yet received, combine to make it all but impossible at this point to say what portion of the citizen suits notices or complaints filed relate, as in the instant case, to purely past violations. It is known that more than 20 such claims have thus far reached the stage of reported decisions, Petition at 22, n.15, so the numbers of those brought and unreported, settled, or still pending is likely to be considerably higher. What is

B. The Plaintiffs' Pattern of Use of Citizen Suits Conflicts With the Congressional Intent In Enacting The Provision.

Far from displaying a motivation solely to protect the public health and welfare, the current pattern and practice of those groups responsible for the upsurge in Clean Water Act citizen suit filings instead appears to demonstrate

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[Footnote Continued]

plainly apparent from a review of the EPA files, however, is that virtually every notice contains claims for civil penalties for past violations, whether the defendant is presently in compliance or not. It is, therefore, in a very real sense that the recent increase in citizen suits is fueled by the availability of civil penalties for past violations.

that the primary motivating factors in such actions, particularly as to past violations, are that the threat of steep civil penalties may serve as a spur to settlement, and that attorneys fees are available to fund the effort.

Holders of NPDES permits under the Act are required to monitor their own effluent discharges, and to file monthly Discharge Monitoring Reports. 33 U.S.C. §1318(a)(3)(A); 40 C.F.R. §122.41(1)(4). These DMRs are public records, and it is a simple matter for a potential plaintiff organization to review them, compare the numerical reports with the permit limits, and establish technical violations of the Act. ELI Study at I-7, V-2, V-12. Courts have generally ruled that the DMRs constitute admissions, and some have held that they provide conclusive evidence of violation of the statute's strict

liability standard.[8]

Under a rule of law that permits civil penalty suits for violations which occurred as long as five years prior to the date of suit,[9] a permittee whose DMRs display even the slightest violation over the previous five years is likely to be

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8. Locust Lane v. Swatara Township Authority, 636 F.Supp. 534 (M.D. Pa. 1986); Student Public Interest Research Group of New Jersey v. Jersey Central Power Co., 642 F.Supp. 103 (D.N.J. 1986).

9. While occasional courts have held there to be no statute of limitations for such actions, and have therefore permitted plaintiffs to go back indefinitely, Student Public Interest Research Group of New Jersey v. Tennaco Polymers, 602 F.Supp. 1394 (D.N.J. 1985), Fishel v. Westinghouse Electric Corp., 640 F.Supp. 442 (M.D. Pa. 1985), the more usual rule is to imply the general federal penalty statute of limitations of five years. 28 U.S.C. §2462. Friends of the Earth v. Facet Enterprises, 618 F.Supp. 532 (W.D.N.Y. 1984); Chesapeake Bay Foundation and Natural Resources

disposed to settlement[10]. The statute sets a civil penalty of "$10,000 per day of such violation," 33 U.S.C. §1319(d), and some courts, including the Court below

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[Footnote Continued]
Defense Council v. Bethlehem Steel Corp., 22 Env't Rep. Cas. 1894 (D.Md. 1985); Conn. Fund for the Environment and Natural Resources Defense Council v. Job Plating Co., Inc., 623 F.Supp. 207 (D.Conn 1985); Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F.Supp. 284 (N.D.N.Y. 1986).

10. The plaintiff organizations may profess to some degree of reasonable judgment in choosing to pursue only those violations which have reached a certain level of significance, but two points in response are worthy of note. First, whatever the enforcement priorities set by the plaintiff organizations, they are bound to differ from those of EPA and the state environmental agencies which by statute are given the responsibility to make such priority judgments. And second, the rule of law which enables these plaintiff organizations to pursue their litigation and settlement campaign is one which will apply

in the instant matter, have interpreted that provision to permit an assessment of up to $300,000 for violation of a single monthly average limitation. Petition at 18a - 22a. Given the severity of the potential penalty, plus attorneys' fees to the plaintiff and the defense costs of litigating the matter, and given the unavailability of other than equitable defenses, a defendant is faced with little choice but to settle.

The settlement terms proferred by the plaintiff organizations provide further

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[Footnote Continued]
to all plaintiffs, including those less responsible in their judgments. A citizen suit for even a single minor and technical violation of the Act five years prior to the filing of a Complaint will be made possible by the plaintiffs' statutory reading. Since a DMR admits liability, and since the statute provides a strict liability standard, $10,000 potential penalty, and attorneys fees in any event, there is little if any incentive not to sue for even the most trivial violation.

demonstration that the current tactic diverges significantly from Congress's intended result. Civil penalties assessed under the Act were meant for deposit in the Treasury. Report of the Senate Public Works Comm. at p. 79, reprinted in 2 Leg. Hist. at 1497, but the settlements which plaintiffs demand often require various environmental contributions in lieu of penalties.

> As a starting point, the environmental groups frequently inform target companies that their settlement goals include entry of a consent decree containing the following provisions:
> 1. civil penalties or alternatively, a contribution of a comparable amount to an environmental project located in the same state,. . . . .
> 4. reimbursement for the plaintiffs' attorney's fees and litigation costs.

Schwartz & Hackett at 328 (1984). See also, J. Miller, Private Enforcement of Federal Pollution Control Laws Part III, 14 Env'l L. Rep.(Env't L. Inst.) 10407, 10426 (1984) Consent decrees in citizen

suits brought by environmental groups have typically included payments of $20,000 to $400,000 to environmental organizations in lieu of civil penalties to the U.S. Treasury.[11] The agreements sometimes provide for a schedule of penalties to be paid to environmental groups in the event that the defendant violates the consent decree; these penalties may amount to far more than the

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11. E.g., Sierra Club v. Keystone Automotive Plating Co., No. HM 84-4020, (D.Md., May 30, 1986) ($400,000 to the Nature Conservancy); Student Public Interest Research Group of New Jersey v. Ragen Precision Industries, No. 83-1604 (D.N.J. Nov. 16, 1985) ($100,000 to the Passaic River Coalition); Sierra Club v. Aluminum Company of America, 585 F.Supp. 842 (N.D.N.Y. 1984) (consent decree Oct. 5, 1984) ($87,400 to the Adirondack Historical Association for environmental education projects and conservation).

initial "contribution".[12] In some instances, the plaintiffs have themselves been the beneficiaries of these payments.[13] Typically, these sums are described as "contributions" to tax-exempt organizations.[14]

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12. E.g., Connecticut Fund for the Environment and Natural Resources Defense Council v. Bridgeport Brass Company, No. H-84-955 (D.Conn. Oct. 23, 1984) ($30,000 to the Open Space Institute, an organization with the same address as the NRDC, plus up to $86,000 more in noncompliance penalties payable to the same organization).

13. E.g., Sierra Club and Natural Resources Defense Council v. Interpace Corp., No. 83-0127C, (W.D.N.Y., Feb. 14, 1983) ($25,000 for environmental projects selected by plaintiffs); Sierra Club v. Philips ECG, No. 83-52T (W.D.N.Y. Jan. 25, 1983) ($15,000 to be used by Sierra Club for projects of its choice relating to Seneca River).

14. E.g., Connecticut Fund for the Environment and Natural Resources Defense Council v. Pfizer Inc., No. H 85-86 (D.Conn. Jan. 30, 1985) (at least $25,000 to "The Open Space Institute, a 501C(3) tax exempt charitable organization").

The United States has protested that payments to private groups in lieu of civil penalties are improper and may be illegal,[15] but such agreements have nonetheless been approved by the district courts.

In addition to contributions in lieu of penalties, the consent agreements usually provide for substantial attorneys fees and other litigation charges to be paid to the plaintiff organizations. Such fees sometimes exceed the amount of the

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15. In its amicus brief in the court below, the United States argued that "all civil penalties assessed in this action must be deposited with the United States Treasury." Brief at n. 18. In its amicus brief on the constitutionality of the citizen suits provision in Student Public Interest Research Group of New Jersey v. Monsanto, 600 F.Supp. 1474 (D.N.J. 1984), the United States went so far as to argue that an environmental plaintiff which settled a citizen suit for a payment to itself could be

penalty or "contribution."[16]

A comprehensive picture of the pattern of citizen suits on a nationwide basis is difficult to provide. But a view of those notices filed in Connecticut is at least instructive, and may be representative of the nationwide practice.

[Footnote Continued]
considered in violation of the Miscellaneous Fees Act, 31 U.S.C. §3302(c), which requires "[a] person having custody or possession of public money" to deposit it in the Treasury. Brief, n. 31.

16. E.g., Student Public Interest Research Group of New Jersey and Natural Resources Defense Council v. J.T. Baker Chemical Co., No. 83-685, (D.N.J., Jan. 19, 1984) ($10,000 civil penalty payable to U.S. Treasury and $29,000 in attorneys' fees and other costs payable to plaintiffs); Hudson River Sloop Clearwater, Inc., and Natural Resources Defense Council v. White Mop Wringer Co., No. 82-CV-1306 (N.D.N.Y., June 12, 1984) ($15,000 to Open Space Institute and up to $23,000 attorneys fees and other litigation expenses).

The sudden upsurge of citizen suit activity in Connecticut began in September, 1983, with the filing of 21 Notices of Intent. The Notices were filed jointly by the Connecticut Fund for the Environment and the Natural Resources Defense Council, and, except for the recitation of the particulars of the discharges, locations, and dates which allegedly violated the Act, the format and language of each Notice is identical.

From 1983 through the present date, 47 Notices are known to have been filed in Connecticut, 42 of which have been filed by CFE and NRDC. Of those 42 Notices filed, two have gone to judgment on the merits,[17] and three are still pending.

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17. CFE and NRDC v. Job Plating Co., 623 F.Supp. 207 (1985), Motion for Summary Judgment decided in favor of plaintiffs on Sept. 27, 1985, on basis that jurisdiction is available for civil penalties for purely past violations,

The remaining 37 have been settled, 10 prior to the filing of a Complaint and the other 27 after suit had been instituted.

According to a recent newspaper accounting, the settlements of the 28 litigation cases in Connecticut have netted at least $916,500 in environmental contributions in lieu of penalties, and an additional $484,250 in attorneys fees to the plaintiff organizations. D.P. Jones, "Activists Pressure Polluters", Hartford Courant, October 6, 1986, p. 1, quoting counsel for CFE. Figures for the 10 matters settled prior to suit are not known.

[Footnote Continued]
settled for $77,500 after Court referred parties to Gwaltney lower court ruling for plaintiffs; CFE and NRDC v. Contract Plating Co., 631 F.Supp. 1291 (1986), citizen suit barred by State's diligent prosecution of prior suit.

These figures are presented not in dispute of their appropriateness as to any given case or fact pattern -- at least with regard to any civil penalties in the nature of prospective relief -- but only to offer some indication of the magnitude of the current use of the citizen suit strategy, and particularly by a small group of six organizations. The availability of environmental contributions, sometimes directly to the plaintiff organization itself, as well as substantial attorneys fees for what is a relatively simple assembly-line type of litigation, provides a significant incentive to bring such litigation. This Congress clearly did not intend in the citizen suits provision of the Clean Water Act.

One further point of pragmatism should perhaps be noted. The enforcement powers of the EPA and its delegated state

agencies granted by the Act include both injunctive relief and penalty provisions. The primary goal of the statute being to achieve full and prompt compliance, a regulatory authority may well choose to forego the imposition of a penalty as a means, whether informally by discussion or more formally by consent order, to persuade a more immediate or comprehensive corrective measure. This flexibility to determine the appropriate enforcement priorities is reflected in the EPA Enforcement Policy. EPA Civil Penalty Policy, Env't Rep. (BNA) (Fed Laws) 41:2991 (1984). That the use of citizen suits for civil penalties for purely past violations interferes with the setting of such enforcement priorities is apparent from the facts of the instant case.

Gwaltney undertook corrective measures to bring itself into full compliance, all with notice to and the approval of the

State Water Control Board, which then declined to press for penalties for past violations. Petition at 3-4. To allow private citizen groups to pick up the enforcement cudgel which the agency, in the exercise of its responsibility to achieve compliance, had chosen to let lie, is both impermissible under the Act and unwise public policy.

CONCLUSION

For the reasons stated above, the amicus respectfully submits that this Court should grant the petition for writ of certiorari in this case.

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APPENDIX A

CITIZEN SUIT NOTICES

Year	All Notices	Notices Filed By Major Environmental Groups*
1978	1	Unknown
1979	9	Unknown
1980	6	Unknown
1981	6	Unknown
1982	19	15
1983	110	72
1984	174	124
1985	138	42
1986**	118	45
TOTALS	558	298

* Natural Resources Defense Council, Atlantic States Legal Foundation, Connecticut Fund for the Environment, Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey.

** Partial results through approximately September, 1986.